

1
2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481

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6 In the Matter of:

7
8 DELPHI CORPORATION, ET AL,

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10 Debtor.

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13
14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17
18 November 16, 2007

19 1:10 PM

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21 B E F O R E:

22 HON. ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE
24
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23 **ALSO PRESENT:**

24 **ROBERT MOTHERSHEAD, Pro Se**

25 **(TELEPHONICALLY)**

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P R O C E E D I N G S

THE COURT: Okay. This is Delphi Corporation.

MR. LYONS: Good morning, Your Honor.

THE COURT: Good morning.

MR. LYONS: John Lyons on behalf of the debtors. And I have here with me today Mr. Matz, Ms. Diaz from Skadden. Then we have Karen Kraft, Dean Unrue and Janine Deluca at Delphi and the claims team.

THE COURT: Great.

MR. LYONS: Your Honor, as is standard I would like to take you through the agenda and various settlements. I believe we have one potential matter that's contested, so why don't I move through the uncontested matters.

THE COURT: Okay.

MR. LYONS: First, Your Honor, on the agenda we have, at item number 1, we have the claim objection regarding the claim of Cherry GmbH. Your Honor, that matter involves a claim. First of all, a general unsecured non-priority claim in the amount of 936,000 dollars and change. A general unsecured non-priority cancellation claim in the amount of 3.4 million dollars and change and a reclamation demand in the amount of 300,000 dollars, approximately, for a total -- aggregate total of 4.7 million approximately.

THE COURT: Cancellation meaning cancellation of an order or something like that.

1 MR. LYONS: Yes, cancellation of a purchase order.

2 THE COURT: Okay. All right.

3 MR. LYONS: The parties have agreed to -- to settle
4 the claim for an allowed general, unsecured non-priority claim
5 in the amount of 1,138,762.48 against DASS LLC. The claim at
6 Cherry GmbH has agreed to waive the cancellation claim in its
7 entirety.

8 THE COURT: Okay.

9 MR. LYONS: However, the claimant does want to
10 reserve the right, pursuant to 503(b) to seek administrative
11 priority status for 161,000 dollars and change, of the claim,
12 to the extent it is a valid reclamation claim. Of course, as
13 we do with all these, we reserve all of our global defenses as
14 well.

15 THE COURT: Right.

16 MR. LYONS: The next item on the agenda, and this is
17 a matter that -- that our co-counsel, Togut Segal, handled is
18 the claim of Bank of America NA as assignee of Olin
19 Corporation. We have reached a settlement agreement with Bank
20 of America.

21 Proof of claim 11660 was asserted by Olin and Bank of
22 America as the assignee in the amount of 10,605,000 dollars and
23 change against DASS LLC. The claimant asserted that of this
24 amount 1.1 million dollars, approximately, was secured by a
25 right of setoff. The parties have agreed to settle the claim

1 for an allowed general unsecured non-priority claim in the
2 amount of 9,153,420 dollars against DASS LLC. Bank of America
3 is going to reserve right to seek reclamation for an
4 administrative priority claim in the amount of approximately
5 19,000 dollars. And the stipulation also provides that Bank of
6 America is authorized to apply two cash in advance payments
7 that were made pre-petition towards satisfaction of open
8 invoices. The total cash in advance payments were 3.2 million
9 dollars. The company has confirmed that -- that from the cash
10 in advance dates that the debtors received deliveries of
11 product sufficient to cover those cash in advance payments
12 prior to the petition date. So there's no pre or post issue
13 there in the debtor's view.

14 THE COURT: Okay. And -- B of A has that money as
15 opposed to Olin?

16 MR. LYONS: Yes. Well, you know, actually I'm not
17 sure how it worked out between the two parties. I'm sure
18 when --

19 THE COURT: But you're -- you're clear that you're
20 settling with the right party.

21 MR. LYONS: We are settling -- yes, we are settling
22 with the right party.

23 THE COURT: Okay.

24 MR. LYONS: There's another 1.16 million that has not
25 yet been applied and they are going to apply it pursuant to the

1 terms of the stipulation.

2 THE COURT: Okay.

3 MR. LYONS: So that -- that is it for item number 2.

4 Item number 3 is the claim objection relating to ARC
5 Automotive. This relates to proof of claim number 9151 which
6 was asserted in the amount of 1,073,000 dollars and change
7 against DASS LLC. ARC asserted that part of that was entitled
8 to administrative expense priority as a reclamation claim. The
9 parties have agreed to settle the claim for 925,467 dollars
10 and forty cents against DASS LLC. The claimant, like the
11 others, is going to reserve the right to seek administrative
12 priority status for 218,000 dollars, approximately, of the
13 claim as a valid reclamation claim subject, of course, to all
14 of our defenses. And so that is it on item number 3.

15 THE COURT: All right.

16 MR. LYONS: Item number 4 is the claim of Timken US,
17 the Timken Company and SPCP Group L.L.C. as agent for the
18 Silver Point Capital Fund and Silver Point Capital Offshore
19 Fund. We'll define these as Timken. We've reached a
20 settlement with the Timken entities relating to proof of claim
21 number 11706 and 14319. Claim number 11706 asserts a general
22 unsecured non-priority claim in the amount of 210,000 dollars,
23 approximately, and a secured claim in the amount of 25,000
24 dollars, approximately, against the debtors.

25 Proof of claim 14319 asserts a general unsecured non-

1 priority claim in the amount of, approximately, 2.8 million and
2 unsecured priority claim in the amount of, approximately, 1.8
3 million and a secured claim in the amount of 550,000 dollars,
4 approximately, against the debtors as a whole.

5 Proof of claim 11706 shall be allowed in favor of
6 SPCP as a general, unsecured non-priority claim in the amount
7 of 235,943 dollars and forty-nine cents against DASS LLC. So
8 that takes care of proof of claim 11706. And proof of claim
9 number 14319 shall be allowed in favor of SPC as a general
10 unsecured non-priority claim in the amount of 2,906,570 dollars
11 and seventy-four cents against DASS LLC. So that resolves the
12 claim of the Timken entity group.

13 THE COURT: Okay.

14 MR. LYONS: Item number 5 on the agenda is the claim
15 of CSX Realty Development. CSX asserted a general unsecured
16 claim in the amount of five million dollars for alleged damages
17 to CSX property in Ohio and Michigan. The parties have agreed
18 to settle the claim for an allowed general unsecured non-
19 priority claim in the amount of 300,000 dollars against DASS
20 LLC.

21 THE COURT: Okay.

22 MR. LYONS: Item number 6 on the agenda is the claim
23 of Goldman Sachs Credit Partners LP, Siemens Financial
24 Services, Inc., and Siemens VDO Automotive SAS, and I'll
25 collectively refer to these parties as Siemens. We've reached

1 a settlement with Siemens relating to proofs of claim number
2 2247 and 13981.

3 Proof of claim 2247 asserts a general, unsecured non-
4 priority claim in the amount of 9.3 million dollars,
5 approximately, against DASS LLC. Proof of claim number 13981
6 asserts a general, unsecured claim of approximately 1.54
7 million against DASS LLC. The parties have agreed to reduce
8 proof of claim number 2247, the 9.3 million dollar claim, by an
9 amount of 1,545,794 dollars and eighty-four cents. In all
10 other respects proof of claim 2247 remains unchanged. So the
11 claim, in essence is capped at 7.7 million dollars,
12 approximately. The rest of that claim is still subject to an
13 ongoing claim objection. And we may or may not be before
14 Your Honor to adjudicate that.

15 THE COURT: Okay.

16 MR. LYONS: Proof of claim number 13981 is allowed as
17 a general unsecured non-priority claim in the amount of
18 1,332,172 dollars and eighty-four cents against DASS LLC. And
19 all distribution on account of this shall be made to GSCP. And
20 we have a stipulation to that effect. And that claim, also, is
21 being handled by Togut.

22 Item number 7 on the agenda is the claim of
23 Viasystems Group, Inc. This relates to proof of claim number
24 12383. Proof of claim 12383 asserts an unsecured, non-priority
25 claim in the amount of 762,104 dollars and eighty cents against

1 DASS LLC. The parties have agreed that DASS LLC shall return
2 and pay to the claimant, in cash, the sum of 365,540 dollars as
3 a return of excessive debit recoupments. The debtors had made
4 a debit recoupment post-petition when, in fact, we've -- the
5 debtors should not have. They're reversing that and that --
6 that effects also the amount of the pre-petition claim. So now
7 proof of claim number 12383 shall be disallowed and expunged in
8 its entirety.

9 THE COURT: Okay.

10 MR. LYONS: Item number 8 on the agenda is the claim
11 of ATS Ohio. We've reached a settlement with ATS Ohio and it -
12 - and Longacre Master Fund Limited, it's assignee, relating to
13 proof of claim number 15671. The claimant initially asserted
14 an unsecured non-priority claim for 1.6 million, approximately,
15 against DASS LLC. We have agreed to settle it in that amount,
16 1, 621,059 dollars and thirty cents against DASS LLC. So we
17 have a stipulation to that effect.

18 THE COURT: Okay.

19 MR. LYONS: Next claim, item number 9, the claim of
20 New York State Department of Taxation and Finance. This
21 relates, in particular, to proofs of claims number 1440 and
22 9824. The 1440 asserts a very large claim of four dollars and
23 ninety-eight cents and 192 dollars and eighty cents. But proof
24 of claim number 9824 asserts a claim of -- a priority claim, of
25 twenty million dollars and change as well as an unsecured, non-

1 priority claim of 29,000 dollars.

2 Your Honor, this is actually a continuation of an
3 audit relating to use taxes. As Your Honor may recall, way
4 back two years ago, you granted a first day order to allow the
5 debtors to pay sales and use taxes. They've completed their
6 audit. We're exercising our authority under that order to pay
7 six million -- approximately 6.1 million which we have already
8 paid actually, under that authority. So as a result the claims
9 are going to be disallowed and expunged in their entirety.

10 THE COURT: Okay. So they've agreed?

11 MR. LYONS: Yes.

12 THE COURT: Okay.

13 MR. LYONS: Yes, they have agreed. That's all in the
14 stipulation.

15 Next claim on item number 10, Your Honor, is the
16 claim of Laura J. Marion. We've reached a settlement with
17 Ms. Marion. It relates to proof of claim 12219. She asserted
18 an unliquidated claim against Delphi Corporation and the
19 parties have agreed that it should be disallowed and expunged
20 in its entirety.

21 THE COURT: Okay.

22 MR. LYONS: Item number 11, which is probably the
23 largest claim to date, is the claim of JPMorgan Chase. This
24 relates to the pre-petition bank facility, Your Honor, when we
25 did put in the new take-out financing we did pay that off. So

1 they're reducing proof of claim number 11047, which was 2.4
2 billion dollars and change and they are reducing that to zero.
3 However, they're preserving their rights for the
4 unliquidated -- their unliquidated indemnification claims which
5 was also authorized pursuant to the order back last January.
6 So that is still going to be preserved but the claim is now
7 reduced to zero.

8 THE COURT: Okay. So I'll -- I'll look forward to
9 seeing those stipulations.

10 MR. LYONS: Yes, Your Honor. We will hand them up,
11 per our custom, after the hearing.

12 THE COURT: Okay.

13 MR. LYONS: Next, Your Honor, we have -- we are to
14 the claim of Azimuth and Mothershead. I believe Mr.
15 Mothershead is on the line.

16 THE COURT: Is that right Mr. Mothershead? Are you
17 on the phone?

18 MR. MOTHERSHEAD: That is correct.

19 THE COURT: Okay.

20 MR. LYONS: Your Honor, I think there is an issue
21 here as to whether he received the various notices. We do have
22 the affidavits of service and actually, Your Honor, and we're
23 waiting to get the actual delivery slips but we did serve all
24 of these pleadings by Federal Express overnight delivery.

25 THE COURT: Well, I guess you're -- I don't know if

1 you -- did you see Mr. Mothershead's e-mail to chambers?

2 MR. LYONS: I did, about half an hour ago.

3 THE COURT: Okay. As I -- as I read that, he
4 acknowledges receiving the notice of adjournment to today's
5 date but says that he didn't receive the response that -- the
6 supplemental reply, excuse me, dated November 6th. I asked my
7 clerk to check the docket on that and -- and there is an
8 affidavit of service on the docket for the supplemental reply
9 by overnight delivery on November 6th. And it's to 18530 Mack
10 Avenue, Cross Point Farms, Michigan 48236. And there's --

11 MR. MOTHERSHEAD: That is my business mailing
12 address, Your Honor.

13 THE COURT: Okay.

14 MR. MOTHERSHEAD: It is a forwarding service.

15 MR. LYONS: And that is also the address on his proof
16 of claim form.

17 THE COURT: Okay.

18 MR. LYONS: Which I have a copy of if Your Honor
19 would like to review it.

20 THE COURT: All right. Which is the same address for
21 the notice of adjournment which was -- there's another
22 affidavit of service of that, for the notice of adjournment,
23 that went out on the 26th.

24 MR. MOTHERSHEAD: Your Honor, I did receive notice of
25 the adjournment. And as I stated in my e-mail, I

1 (indiscernible) and I have no excuse for (indiscernible) other
2 than my own failing eyesight.

3 THE COURT: Okay.

4 MR. LYONS: Your Honor, in addition, and this is a
5 letter -- maybe Mr. Mothershead can confirm it, but my
6 colleague Joe Orton also sent him a letter on October 10th
7 which went through the notices. If there's any --

8 THE COURT: No, he -- he acknowledged about the date
9 of this hearing. Have you had a chance to read the
10 supplemental reply, Mr. Mothershead?

11 MR. MOTHERSHEAD: Your Honor, I -- I received notice
12 from (indiscernible) in e-mail last night and I opened and
13 received that document, went to the Delphi docket, downloaded
14 that (indiscernible). And I've been able to spend about forty-
15 five minutes looking at it. But I did not -- had not seen or
16 was even aware of it until approximately 9 AM this morning.

17 THE COURT: Okay. Well, I spent a little less time
18 looking at, no offense. I mean, one of the reasons I spent
19 less time looking at it is that it's clearly written. So, you
20 know, I don't know, it doesn't seem to me that there are any
21 surprises in here. The debtors' arguments are, I believe,
22 arguments in response to the contentions in the claim. There's
23 no, sort of -- nothing, sort of, that comes out of left field
24 as far as I can see. My -- my inclination, therefore, is to go
25 ahead with this hearing. If it turns out, during the

1 discussion or during the hearing, that I feel that some point
2 hasn't been adequately addressed or Mr. Mothershead hasn't had
3 time to think about the issue, I'll -- you know, I may change
4 my mind and ask for some further submission or further hearing.
5 But at this point, I don't believe that there's a basis or a
6 reason for adjourning it. This is something that obviously
7 Mr. Mothershead's been living with for a long time. The proof
8 of claim lays out the arguments for going behind or over or
9 around the settlement agreement. And again, as I said, I think
10 the debtors' reply or supplemental reply addresses those
11 arguments and doesn't raise any -- any, sort of, new additional
12 issue

13 MR. MOTHERSHEAD: May I speak, Your Honor?

14 THE COURT: Sure.

15 MR. MOTHERSHEAD: I would generally have to agree
16 with you that I don't think there's anything that's directly
17 coming out of left field. However, I do believe that there
18 are, and again this is on a very, very brief review of this
19 material, I do believe that there are some misstatements and
20 some issues of fact that here may need to be expanded upon
21 or -- or corrected.

22 THE COURT: Okay. Well, again, this is what's
23 referred to in the claims procedures order as a "sufficiency"
24 hearing. So if I conclude that there are material disputed
25 facts, that is, facts that go to the essence of the claim and

1 that are disputed, then as far as this hearing is concerned you
2 would win and there would have to be an evidentiary hearing.
3 But I think I'd like to go through the argument to see whether,
4 in fact, there is something that's disputed that's -- that is
5 truly material in light of the -- the two issues. And so let
6 me hear from counsel for the debtor first, and I may have some
7 questions for him. And then I'll hear from you. But again, as
8 I understand it, except as it may be relevant to the
9 enforceability of the settlement agreement, facts in existence
10 or facts dating from before the entry of the settlement
11 agreement are -- are irrelevant.

12 And I understand, generally, what was settled as part
13 of the settlement agreement. And as I understand it, you have
14 two bases for contesting the enforceability of the settlement
15 agreement. And it's those two issues that are at issue here.
16 If the debtor prevails and convinces me that those bases don't
17 fly then the settlement agreement governs. If, on the other
18 hand, you convince me that there are open issues, then we go
19 back to the merits of the original claim that was ostensibly
20 settled in the agreement. So I want to focus on the two
21 grounds asserted for claiming that the settlement agreement is
22 not enforceable.

23 So why don't I hear from the debtor on that?

24 MR. LYONS: Sure, Your Honor. You know, again, Mr. -
25 - putting aside the settlement agreement, which again was a

1 fully integrated contract with a general release which -- which
2 really did, you know, as Your Honor noted, clean up anything
3 that happened before that. There was a general release and all
4 claims were released. Mr. Mothershead was paid 19,500 dollars
5 in exchange for that.

6 Mr. Mothershead has two theories that somehow he was
7 defrauded into entering into that agreement. You know, again,
8 Your Honor there is an integration clause that states that he
9 did not rely on any kinds of representations before he entered
10 into that agreement. And, moreover, when you look through his
11 documents there is no false statement -- certainly no false
12 statement identified to any particular speaker, which
13 Mr. Mothershead relied upon in entering into this agreement.
14 Mr. Mothershead's fraud allegations really relate to the
15 supposed ongoing fraud that the debtors were allegedly trying
16 to cover up, Your Honor, that has no bearing on whether he was,
17 you know, duped into signing the settlement agreement.

18 He -- he gets close to that when he says, "well, the
19 debtors convinced me there was no fraud and therefore I was
20 defrauded into entering into this agreement." Your Honor, that
21 makes no sense. I mean, either he believed there was fraud or
22 he did not. Why would he -- according to his theory Delphi
23 retaliated after he uncovered this -- this supposed activity
24 and therefore that's why he brought this claim. So his
25 allegations of pinpointing a statement of material falsity and

1 relying on that, Your Honor, is just not in any of his papers.

2 So as a matter of law, he has not stated a reason --
3 he has not established fraud to be able to -- to get around the
4 clear language -- the clear and unambiguous language of the
5 release, especially in light of the integration clause. So
6 that's the fraud count.

7 The other is that he was coerced into entering into
8 this agreement. And his coercion, and again he's an officer of
9 a company. So there's no allegation at all that the company
10 was somehow coerced into this. So it really must relate to his
11 own personal -- his own personal estate. And he alleges he was
12 coerced because the debtors knew he was defaulting on a
13 mortgage. Michigan law is pretty clear, Your Honor, and we
14 cite it in our papers, that fear of financial ruin alone is
15 insufficient to establish economic arrest.

16 It must be established that the person applying the
17 coercion acted unlawfully -- and that's the Whirlpool case that
18 we cite, Your Honor. We just don't think there are any
19 statements or allegations that would be able to establish
20 coercion under Michigan law that would give him a defense to
21 the clear and unambiguous settlement agreement.

22 Are there any other matters, Your Honor? Those are
23 the two main points that -- that we saw in his various proofs
24 of claim and --

25 THE COURT: Those -- those were the two issues that

1 I -- I identified. But if there's something else,
2 Mr. Mothershead, you should -- you should let me know. But
3 those were the two points that I thought your claim was based
4 on.

5 MR. MOTHERSHEAD: And I thank you for giving me the
6 opportunity to speak. I, again, not having the time to fully
7 understand everything that is written here by the debtors'
8 counsel, I can tell you that even on the one phrase, either Mr.
9 Butler says the lien there was fraud or he did not, I think
10 that the pathology that comes (indiscernible) language that
11 looks good on printed paper, but is not reflective of what's
12 happening nor the information that I received and that I have
13 documented in detail -- in a great amount of detail, in a
14 fifty-seven page affidavit. Essentially, I did believe that
15 there's fraud. I did not understand accounting rules nor the
16 accounting mechanisms that would have led, from what I thought,
17 being an observer, which was the manipulation of widespread and
18 ongoing manipulation of the floor inventory data to debtors'
19 income statement or balance sheet. I couldn't figure that out.
20 I didn't understand it at the time. I since have learned that
21 work that (indiscernible) are an expense to the company that's
22 attractive to the company. And it's metered out on a first
23 (indiscernible) basis. I did not know that at the time. And
24 thus, my ability to (indiscernible) make changes to this data
25 that's provided by (indiscernible) on an ongoing basis could

1 not connect that materially to where it's going to end up at,
2 where is the money.

3 As to the fact that I was told that executives
4 (indiscernible) the CEO of the company believed that the debtor
5 was forty percent over capacity, and in rough terms we're
6 talking about approximately 500 million dollars of expense per
7 year, forty percent over capacity, and the numbers that I
8 (indiscernible) and that my client at Delphi was showing to me,
9 indicated that they were reporting ten percent. And exerting
10 manipulation on the numbers to insure that that number did not
11 exceed ten percent.

12 THE COURT: I guess the -- the point that I thought
13 the debtor was making there, and maybe I can restate it, is
14 that one element of fraud that needs to be shown, among
15 several, is that the claimant, you, acted in reliance upon the
16 false statement or misrepresentation. And I guess that's where
17 I'm having a hard time understanding how -- and again, this is
18 a sufficiency hearing.

19 So I take, at its face, what you've asserted in the
20 claim noting, you know, that issue if you get beyond the
21 sufficiency hearing is something the debtor can contest. But
22 here I'm looking at whether on the face of the claim the claim
23 can stand. And my difficulty is seeing how, in negotiating the
24 settlement, you -- you relied on this. It seems to me that if,
25 as your argument is, that if the debtor was concealing an

1 accounting practice that was unlawful, that may have
2 consequences for those who relied on the accounting practice--
3 and of course there's been multi-district litigation commenced
4 on that for a class that arguably relied on accounting errors
5 of the debtors -- but I don't see how that would have led you
6 to have settled your contract receivable with the debtor
7 differently.

8 MR. MOTHERSHEAD: Your Honor, at the time that I was
9 going through this with the debtors I was under a great deal of
10 stress. However, more specifically I was not aware of Chapter
11 4, section 5 of (indiscernible) nor the FFA 151, both of which,
12 effectively, forbid companies from under reporting --

13 THE COURT: But how -- how would that have affected
14 your negotiation with the debtor on whether they owed you
15 150,000 dollars or 69,000 dollars?

16 MR. MOTHERSHEAD: Certainly if I had known the fact
17 of the matter at the time that Delphi and its executives were,
18 at least according to public reports, had been confirmed were
19 committing inventory misrepresentations, which had been, to the
20 best of my knowledge, made public by the SEC, I would have
21 (indiscernible) to confirm what were very strong suspicions at
22 the time. And I would have proceeded forward.

23 THE COURT: In -- in what manner?

24 MR. MOTHERSHEAD: I would not have settled.

25 THE COURT: I guess, I don't understand -- how would

1 that information later affect your litigation against Delphi?

2 MR. MOTHERSHEAD: I'm sorry, Your Honor, could you
3 repeat that?

4 THE COURT: Sure. I'm sorry. Let me -- let me take
5 that. You say you would not have settled; that means you would
6 have litigated with Delphi about the amount owing. I mean,
7 that's the alternative to settling. How would this information
8 have affected your litigation?

9 MR. MOTHERSHEAD: Well, we would probably, quite
10 frankly, Your Honor, (indiscernible) even more difficult than
11 what I'm going through now because I would have had to have
12 proven two or three years in advance of the actual fact
13 (indiscernible) Delphi was, in fact, committing accounting
14 fraud.

15 THE COURT: But I don't understand why that
16 contention affects your employment litigation? Isn't that just
17 a separate issue?

18 MR. MOTHERSHEAD: I'm sorry, Your Honor. It's a
19 combination of having difficulty hearing you, there's a great
20 deal of buzz on the line.

21 THE COURT: What I'm saying is, I don't see how an
22 allegation that Delphi was committing accounting fraud, on
23 the -- on the securities market, how that would affect your
24 contract litigation.

25 MR. MOTHERSHEAD: Well, I would have had proof to

1 Delphi (indiscernible) sweep it under the carpet.

2 THE COURT: But -- okay. But -- but -- again, why
3 does that -- if I -- if I -- pretend for a second that I'm the
4 judge presiding over your litigation in State Court where you
5 say you're owed 150,000 dollars and Delphi says we've already
6 paid as much as we agreed to pay, if you said to me "and also,
7 Judge, they've committed accounting fraud on the securities
8 markets," what is your response to my statement that "that's
9 fine but you should be telling the SEC or the Michigan Attorney
10 General or, you know, filing a separate claim if you think
11 you've been damaged by that"? I don't see how that affects, in
12 other words, the particular dispute that you had at the time.

13 MR. MOTHERSHEAD: And again, I'm hearing the end of
14 your sentence. (Indiscernible).

15 THE COURT: All right. Well, let me say it one more
16 time.

17 MR. MOTHERSHEAD: Sorry, I'm having trouble hearing
18 you clearly, I'm sorry.

19 THE COURT: All right. Let me say it one more -- can
20 you hear better now?

21 MR. MOTHERSHEAD: It's actually worse.

22 THE COURT: It's worse now. Can you -- how about
23 now?

24 MR. MOTHERSHEAD: That's much better.

25 THE COURT: All right. That's where I was before, I

1 thought. The -- the question I'm posing to you, and I'm posing
2 it to you in the form of a hypothetical. Assume for the
3 moment, and by the way speak up if you can't hear me at any
4 time, don't let me go to the end before telling me.

5 Assume for the moment that you've not settled with
6 Delphi, that you're now in court in front of a State Court
7 judge and the dispute is whether Delphi owed you 150,000
8 dollars plus interest or whether Delphi doesn't owe you
9 anything, which is Delphi's position. You tell the Court,
10 "Judge, I think that Delphi is committing accounting fraud and
11 that's affecting the securities markets." What is your
12 response to the State Court judge's comment, which is "that's
13 interesting, but that's not what's before me. You should go
14 talk to the SEC or the Michigan Attorney General, or, if you're
15 directly affected by the accounting fraud, a lawyer, about that
16 issue."

17 In other words, why is that point relevant to a
18 dispute over whether 150,000 dollars is owed, or nothing?

19 MR. MOTHERSHEAD: I can only say, Your Honor, that in
20 that in that hypothetical situation, and the time
21 (indiscernible) towards supporting my claims for Delphi's
22 motivation to withhold payment from me and to extract a
23 confidentiality agreement from me that is unilateral and untime
24 limited and which effectively they were able to procure at a
25 cost of about ten cents on the dollar. And essentially contain

1 my information in (indiscernible) disclosure and my further
2 discussions with my constituents for four years, that's what
3 they got out of it.

4 In the absence of that as a motivating factor, I
5 understand completely where you're going, is this really
6 related? All I can tell you, sir, is that it was very related
7 at the time in that I brought the information to Delphi and
8 when it was brought to them I was immediately shown the door
9 and my bills were repudiated and my work was denegated. And
10 they were able to trickle along for four months after I first
11 presented my bill to them and left me in a very, very
12 diminished capacity. So I -- but I do understand that, and I
13 guess this is the bottom line, they -- the question is, do they
14 owe me the fees or not? I still believe they owe me the fees.
15 The question is whether I signed that agreement? Yes, I did
16 sign that agreement. And I know what the agreement says.
17 However, because I was not able to adequately articulate the
18 fraud or for (indiscernible), I was not able to provide any
19 compelling reason for why I thought they were perpetrating the
20 accounting misrepresentation, I didn't have -- I didn't have
21 leverage to negotiate a better settlement for myself.

22 THE COURT: Well, but that's a different point. I
23 don't think you're really relying on that, because if you did
24 use that type of leverage, obviously that would have been
25 improper.

1 MR. MOTHERSHEAD: Yes, and I thought of that and I
2 did not try to do that. That was part of the issue. I felt I
3 could not go forward because I did not have proof. I couldn't
4 understand the situation. I very much understand the
5 situation --

6 THE COURT: But well, what I'm saying is, I doubt and
7 I don't believe you really mean to say this, but I doubt you
8 would have gone forward and extracted more money out of Delphi
9 if you did have proof, because that would truly have been
10 wrongful.

11 MR. MOTHERSHEAD: Well, I wouldn't go away.

12 THE COURT: But you wouldn't have used that
13 information in a private way to collude with --

14 MR. MOTHERSHEAD: No, I would not have.

15 THE COURT: No, of course not. Okay. Why don't we
16 turn to the duress argument.

17 MR. MOTHERSHEAD: (Indiscernible) duress argument.

18 THE COURT: Well, the debtors' counsel dealt with the
19 fraud point and then he said that in Michigan, and this is the
20 law generally, but in Michigan duress or coercion is
21 recognized, but only in a limited way. That is, the law
22 recognizes that parties who are negotiating agreements don't
23 literally sit across the table from each other, with exactly
24 the same amount of leverage. One party may be wealthier than
25 another, one party may have more need for a product than the

1 other and that's all part of the process of negotiating an
2 agreement. The area where someone is coerced or subject to
3 undue duress is where one party, in addition to having that
4 type of leverage, does something unlawful to the other party
5 that compels them to act. For example, saying "if you don't
6 sign this agreement I'll break your knees," or "if you don't
7 sign this agreement I'll report you to the SEC," those sorts of
8 things. And -- and --

9 MR. MOTHERSHEAD: I think I can address that.

10 THE COURT: Okay.

11 MR. MOTHERSHEAD: I don't think I can address the
12 quoted Michigan law that fear of financial ruin alone is
13 (indiscernible). I can't directly address that. But what I do
14 believe is that this is (indiscernible), I was personally
15 threatened by people inside Delphi. I was threatened by Delphi
16 purchasing that all of my leads were going to be back-billed to
17 me. That Delphi was going to come after me from a legal
18 standpoint to get those fees back up if I proceeded with this
19 pattern. I was told I would never work at Delphi again nor
20 to -- to the extent possible at General Motors. And there were
21 extenuating circumstances, including the fact that I had been
22 put into a position where I had done a dramatic amount of work
23 (indiscernible) on the basis of prior course of conduct that
24 left me with no source of income and they knew it. And whether
25 that's called financial ruin or not, I'm -- you know, I --

1 there's a lot of room for interpretation there. However, I do
2 believe that the -- the fact that (indiscernible) threat, the
3 threat of back bill -- oh, at the same time to even put that
4 on, I had to go through an internal audit process at Delphi
5 that was purely manufactured in order to create additional
6 burden on me to back off of this issue. And all of this was as
7 a result of my discussions with their attorneys and their --
8 some of their executive officers that they had material
9 inefficiencies, material weaknesses in their process related to
10 the control of their floor space inventory and that
11 (indiscernible) which was coming into law two months down the
12 road and which came into law about ten weeks after -- I'm
13 sorry, before I finally signed my settlement agreement. I told
14 them that they have a (indiscernible) issue. And as a result,
15 and I think it probably was happening (indiscernible), but as a
16 result of all this, that brought the full force of Delphi down
17 on top of my shoulders.

18 THE COURT: Well, when you said physical threats,
19 what do you mean?

20 MR. MOTHERSHEAD: One particular director inside of
21 Delphi in one very odd conversation told me how much he liked
22 guns, how much he liked shooting guns, how much he liked
23 shooting (indiscernible) and you've got to be careful because
24 things can happen to you. And I didn't know how to take that.
25 But I can tell you that since that time I've done everything I

1 can to keep my personal address and phone numbers private and
2 have (indiscernible) try to go incognito as far as my personal
3 residential information. I was concerned. Did I really think
4 that this fellow (indiscernible) and Delphi (indiscernible),
5 I'm not sure. But when someone says that to you these days --
6 you have to remember this is right after 9/11. I took it
7 seriously. So yes, there was -- there were issues beyond
8 financial issues.

9 THE COURT: Okay.

10 MR. LYONS: Your Honor, obviously none of this is
11 anywhere in any of his papers he's ever filed.

12 MR. MOTHERSHEAD: That's not correct.

13 THE COURT: Well, not the physical threat. That's
14 not in there. The economic point is in there. The point about
15 leading me on to work more is in there, for several months.

16 MR. LYONS: Again, that of course is before the
17 settlement agreement.

18 THE COURT: Right.

19 MR. LYONS: That's his theory.

20 THE COURT: Right.

21 MR. LYONS: Which, you know -- and our contention is
22 that's been released.

23 THE COURT: Right.

24 MR. LYONS: Your Honor, a couple of things. I know
25 we don't have to address this now, this is a sufficiency

1 hearing, but obviously Delphi strongly contests all these
2 theories of fraud. In fact, he did report them to the SEC and
3 OSHA and they found no reason to further proceed. But that's
4 apart from the sufficiency hearing but I just want to be on
5 record.

6 THE COURT: No, I understand. And I've read the
7 letters attached to the -- not to the claim but to -- to
8 Mr. Mothershead's request to hold matter in abeyance. And
9 frankly, the letters that were sent before the settlement was
10 entered into don't reference any of this. But again, that's --
11 that's for another day.

12 Okay. Do you have any other response?

13 MR. LYONS: No, Your Honor, just to say, you know, in
14 looking at legal sufficiency, Your Honor, you know, applies the
15 law and determines whether the elements have been met by
16 reading, construing, obviously, in Azimuth's favor, the
17 contentions. But, you know, for the papers and for the
18 argument today we do not believe that Azimuth has stated a
19 legally sufficient cause of action to basically vacate the
20 settlement agreement entered into by a very sophisticated
21 business person.

22 THE COURT: Okay. All right. I have before me the
23 debtors' objection to the claim filed by Azimuth North America
24 LLC, who is in this hearing represented by a principal or its
25 principal, Mr. Mothershead. The objection is premised upon a

1 settlement agreement that was entered into between the debtor
2 on the one hand and Azimuth and also Mr. Mothershead in his
3 individual capacity, I believe. Let me just double check that.

4 MR. MOTHERSHEAD: Yes, Your Honor. That is correct.

5 THE COURT: Okay. Which Mr. Mothershead concedes, if
6 it were in fact binding, would dispose of this claim, in that
7 it includes a general release and the claim is premised upon
8 the very dispute that was the subject of the settlement
9 agreement, specifically, as well as, obviously, there being a
10 general release. Mr. Mothershead's claim and his statement
11 seeking that the matter be held in abeyance, which was filed in
12 April and which I take to be a further statement in support of
13 the claim, raises two grounds for the unenforceability of the
14 settlement agreement. The first is that Azimuth, through
15 Mr. Mothershead, was fraudulently induced by Delphi into
16 entering into the settlement agreement. I conclude, as a
17 matter of law, in this sufficiency hearing where the standard
18 is akin to the standard for a motion to dismiss, that even were
19 the factual allegations in the claim, as amplified by the
20 additional filing by Mr. Mothershead, actually proven to be
21 true, that they would still not state a claim for fraudulent
22 inducement or misrepresentation.

23 The law on the elements of fraud or misrepresentation
24 is clear in Michigan, which governs this dispute. And it's
25 essentially the same law throughout the country: in a claim,

1 that must be plead with particularity, under Rule 9(b) of the
2 Federal Rules, the claimant must show that (1) the defendants
3 made a material misrepresentation; (2) that it was false; (3)
4 that when the defendants made it the defendants knew that it
5 was made -- that it was false or made recklessly without
6 knowledge of its truth or falsity; (4) the defendants made it
7 with the intent that plaintiff would act upon it; (5) that
8 plaintiff acted in reliance upon it and (6) that plaintiff
9 suffered damages.

10 I conclude - and the colloquy with Mr. Mothershead on
11 the record today I think confirms it, that the alleged
12 misstatement or actually fraudulent omission here is not
13 something that plaintiff could have acted on in reliance. The
14 alleged fraud or misstatement was that Delphi withheld that it
15 had engaged in fraudulent reporting or accounting practices.
16 Mr. Mothershead stated that if he had known of that statement,
17 or of that fact, he would not have entered into the settlement
18 agreement. But it does not appear to me that it would have
19 been relevant at all to his claim for damages in that it is not
20 linked to that claim in any respect. Clearly, he could not
21 argue that he would have entered into a better settlement
22 agreement, because that would have been a wrongful act in that
23 he would have been using what he would have learned in a
24 wrongful way to extract money from Delphi and not to report it
25 to the responsible authorities.

1 I note also that the claim itself and the backup does
2 not plead the alleged fraudulent communication or failure to
3 communicate with any particularity but that's really beside the
4 point, given the absence of any action in reliance on the
5 statement.

6 The other basis for contending that the settlement
7 agreement is not binding, or void, is that Mr. Mothershead was
8 allegedly coerced into entering into it. Michigan law
9 recognizes that under certain limited circumstances a claim for
10 duress or coercion may lie to vitiate an agreement. However,
11 it is clear under Michigan law that a claimant or a plaintiff
12 must prove that the unlawful act of another induced the
13 plaintiff to make a contract or perform some act under
14 circumstances that deprive him of his free will. See Whirlpool
15 Corporation v Grigoleit Company, 2006 WL 1997402, at *3 (W.D.
16 Mich. July 13, 2006) (citing Hackley v. Hedley 8 N.W. 511, 512
17 -13 (Mich. 1881)).

18 The claim itself alleges economic factors that led
19 Mr. Mothershead to enter into the settlement agreement, i.e.,
20 that Delphi knew that he and his business were hard-pressed
21 financially and that Delphi had contributed to that fact by
22 asking him to work additional time -- the inference would be
23 that he would have been working for other parties or other
24 companies during that time -- without compensation.

25 I note that Mr. Mothershead is a sophisticated

1 business person. He acknowledged that in the settlement
2 agreement; and the correspondence appended to his supplemental
3 papers also states in describing Azimuth "we are a small firm
4 with blue chip client credentials and experience." I do not
5 believe that the use by Delphi of its knowledge, that Azimuth
6 and/or Mr. Mothershead were either financially strapped or that
7 Mr. Mothershead himself had health problems, which has not been
8 argued at oral argument but is asserted in the claim, would be
9 sufficient, under the law that I just quoted, to constitute
10 duress or coercion under Michigan law.

11 The agreement itself specified that it was settling
12 the claim that Mr. Mothershead had for not being paid for the
13 extra time that he contended Delphi had asked him to work, and
14 I do not believe that such an agreement bargained for between
15 sophisticated parties can subsequently be voided on the
16 allegation that one of the parties had, in fact, done exactly
17 what the agreement settled, i.e., caused the other party to
18 work on an uncompensated basis for several months.

19 So, based on the face of the claim, and the pleading
20 filed in supplement to that, I will grant the claim objection.

21 It has been alleged, at oral argument, that Mr.
22 Mothershead was physically threatened in -- in response to
23 which he entered into the settlement agreement. Obviously a
24 physical threat that would constitute an unlawful act would
25 constitute duress or coercion under Michigan law. I will not

1 accept, however, an unsworn oral representation over the phone
2 to that effect.

3 However, I would consider a motion for leave to amend
4 the proof of claim, which is obviously after the bar date, to
5 add or to amend the claim to assert such an unlawful threat. I
6 note that filing a proof of claim is a serious act and there
7 needs to be a valid basis for it. And that the legend at the
8 bottom of the proof of claim means something. I also note that
9 I have denied, more than once in this case, motions to file
10 late claims or amendments to claim that added a new type of
11 claim. So that's why I'm limiting my remarks to saying that
12 obviously Mr. Mothershead could make a motion to amend his
13 claim at this time on notice to the debtors. And if he does
14 so, I'll consider it at that time. But it would be limited to
15 a claim based on an allegation of physical coercion, because
16 I'm ruling today that, as filed, the claim does not sustain a
17 claim.

18 I don't know if that's entirely clear to you,
19 Mr. Mothershead. I know you're not a lawyer, but let me
20 explain it in a little simpler terms. You know that there was
21 a bar date set in this case by which claims had to be filed?

22 MR. MOTHERSHEAD: I'm sorry, I'm having trouble
23 hearing you right as you -- if you could lean into the
24 microphone.

25 THE COURT: All right. Well, tell me if you can't

1 hear me and I'll repeat what I just said.

2 MR. MOTHERSHEAD: I can hear you great now.

3 THE COURT: Okay. The debtors obtained a bar date
4 order which required that all proofs of claim be submitted by a
5 specific date, which has long past. You filed your claim,
6 apparently, within that date and that's why -- one of the
7 reasons I'm considering it today. I have granted the debtors'
8 objection to your claim because, as filed, I conclude it does
9 not state a legally allowable claim.

10 At oral argument you made a contention that wasn't
11 stated in the claim that there were physical threats that
12 coerced you into signing the settlement agreement. You have
13 the right to file a motion seeking to have the ability to file
14 an amended claim alleging those threats, if you believe that
15 they would give rise to a claim for coercion or duress that
16 would be sufficiently unlawful to void the settlement
17 agreement. If you did that, the debtors would have the right
18 to object to that motion and say that it's too late. And I
19 would decide that dispute. But if you do decide to amend your
20 claim, that would be the only basis for it. You can't say,
21 again, there was fraud or there was economic duress or some
22 other form of duress other than the physical duress that you've
23 identified and alleged orally.

24 MR. MOTHERSHEAD: Excuse me, Your Honor.

25 THE COURT: Yes.

1 MR. MOTHERSHEAD: Do you mean that I would withdraw a
2 claim (indiscernible).

3 THE COURT: No, no, your claims of -- the claim as
4 filed is disallowed because I've ruled that they don't state a
5 claim.

6 MR. MOTHERSHEAD: Okay.

7 THE COURT: But I'm not ruling on your physical
8 threat claim because it's really not before me in the proof of
9 claim you filed. And I'm telling you, which I wouldn't do to a
10 lawyer because a lawyer would know this, but I'm telling you
11 there is a procedure under the Bankruptcy Code for filing a
12 request for an amended claim or a late claim and there are
13 defenses to that. And if you want to pursue that there's a --
14 there's a, you know, process for doing that. But the claim as
15 filed, for the reasons I've stated on the record, is
16 disallowed. So the debtors' should submit an order to that
17 effect.

18 MR. MOTHERSHEAD: Thank you, Your Honor.

19 THE COURT: Okay. Thank you. Okay. Is there
20 anything else to be had -- heard?

21 MR. LYONS: We were looking for the chart, Your
22 Honor, but that's the next hearing.

23 THE COURT: the chart of --
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MR. LYONS: Kind of, the update where we are. So we
will -- that's all we have and we'll see you, I guess, December
6th.

THE COURT: Okay. Very well, thank you.

MR. LYONS: Thank you, Your Honor.

(Proceedings concluded at 2:14 PM)

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I N D E X

RULINGS

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Granted

C E R T I F I C A T I O N

I, Pnina Eilberg, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, except where, as indicated, the Court has modified its bench ruling.

November 19, 2007

Signature of Transcriber

Date

Pnina Eilberg

typed or printed name